No. 6173

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Grace E. Low,
Appellant,

vs.

Sutherlin, Barry & Company, Inc., a corporation, and John E. Sutherlin,
Appellees.

BRIEF OF APPELLEES.

JOSEPH L. LEWINSON
L. R. MARTINEAU, JR.
WARREN STRATTON
Attorneys for Appellees.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

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Statement of the Case.

Appellant's brief does not contain an adequate statement of the case, and is misleading by reason of erroneous assertions and the omission of material matters.

The demurrer was sustained without leave to amend, not only because the amended complaint failed to state a cause of action, but also because in four other actions previously brought by appellant against appellees in the court below, on the transaction here in suit, appellant had been unable to state a case in any of her respective pleadings. [Tr. 113-116; 162-170.]

The case undertaken to be argued in appellant's brief is largely hypothetical, and not based on the record.

It is claimed in the brief that appellant, although the owner in possession of valuable apartment house properties and faced with the necessity of re-funding obligations in excess of $300,000, was so weakminded and in such a state of mental confusion that she did not know the income of her properties and could not grasp the idea of selling bonds at ninety, or understand the terms of mortgages relating to interest maturities, or the obligation to keep property insured. (Ap. Br., p. 15.) While appellant was in this condition, according to the brief, corporate appellee, an investment banker, and individual appellee, its president, gained appellant's confidence and suggested she make an application to corporate appellee for refinancing. To this suggestion, it is said in the brief, appellant, in effect, replied, "All right, but I am under great mental stress and will simply have to rely on you." (*Id.* p. 7.) Whereupon appellees "assumed the character and status of confidential advisors 'to the end that they would utilize their wide and varied financial experience and prepare for her a careful and conservative 'set-up' on which in all future negotiations plaintiff might safely act.'" (*Id.* p. 8.) Under these circumstances, the brief charges, appellees prepared and submitted to appellant a set-up as the basis for a bond issue secured by a mortgage, which set-up represented appellant's income as larger than it was, and represented the interest, insurance and other requirements of the bond issue as less than appellant's income. The brief further charges: In making these representations, appellees acted dishonestly and with the design and purpose of inducing

appellant to mortgage her properties to corporate appellee on such conditions that corporate appellee would be able to foreclose and acquire the properties for less than their true value (*Id.* p. 20); appellees accordingly foisted on appellant a loan agreement and bond issue secured by a mortgage, in terms different than the set-up, on the false representation that the terms were the same. Although appellant read the instruments, she "did not grasp, understand or realize" what she was doing, and "merely signed on the dotted line, blindly trusting appellees." (*Id.* p. 12.) As a result of this fraud and circumvention, appellant issued mortgage bonds, and defaulted in the payment of interest and breached her covenant to keep the property insured; and appellees caused the property to be foreclosed, and purchased the same at the foreclosure sale for half its true value. (*Id.* p. 21.)

The case thus presented in appellant's brief is not at all justified by the record.

It appears from the amended complaint: (a) appellees practiced no fraud on appellant and on the contrary extended many indulgences to her; (b) appellant was in her right mind and read and understood the documents; (c) appellant knew the income of her property and defaulted because she misapplied the income to her personal uses; (d) appellees did not stand in a confidential relationship toward appellant; (e) appellant makes no allegations of fact relative to the supposed set-up upon which she attempts to base her case.

In September, 1925, pursuant to a contract made with appellant in June of that year, corporate appellee purchased from appellant mortgage bonds of the face value

of $360,000 at ninety, or for a cash consideration of $324,000. [Am. Comp. Tr. 129-130.] Maturities were arranged so that no principal fell due for the first two years. The bonds were dated August 1, 1925, and the first semi-annual interest fell due on February 1, 1926. This was not paid. Meanwhile, appellant had failed to keep the properties insured, and on December 23, 1925, she had been notified of her default in that regard. (*Id.* 132.) On March 1, 1926, appellant was served with notice of default. (*Id.* 133.) Notice of sale was also given and the date fixed as May 25, 1926, although the indenture required only thirty days' notice. (*Id.* 137.) At appellant's request, the date of sale was postponed to June 1, 1926, then to June 8, 1926, then to August 1, 1926, then to August 12, 1926. [Am. Comp. Tr. 137 and Exhibit "E", Tr. 102.] Appellant still being in default on the date last mentioned, the sale was had, and the property sold to the corporate appellee, who was the only bidder. [Am. Comp. Tr. 135.] Appellant was not prevented from bidding or presenting bidders at the sale, but she neither bid nor presented a bidder. All appellant did in connection with the sale was to have a Mexican gentleman present, not with any cash, however, but merely with a promise to pay the amounts in default sometime in the future if the sale were again postponed. Appellant has never undertaken to redeem the property and she did not bring this suit until more than two years after the sale, namely on November 21, 1928. [Tr. p. 108.]

From the amended complaint it appears that appellant was not distracted to the point of lunacy when she contracted to make the loan, as claimed in her brief. On the

contrary she was in full possession of her faculties, and knew what she was about at that time and all other times here in question. Thus, it is alleged that prior to the execution of the loan agreement "plaintiff called the attention of defendants, and particularly of defendant John E. Sutherlin, to the provisions therein contained as to the insurance required to be placed and paid for by plaintiff upon her said Engstrum and Venice properties, and stated to said defendants that the insurance requirements therein set forth appeared to be in excess of the amount provided for in the said 'set-up' as prepared by defendants and exhibited to plaintiff as aforesaid." [Tr., pp. 126-127.] This allegation of the amended complaint would appear to refute the fanciful assertions in appellant's brief relative to her mental condition and failure to comprehend the papers she signed. It is likewise inconsistent with, and controls, the much more restrained and only allegation in the amended complaint on the subject, namely:

> "That plaintiff was without any business experience and particularly without experience as to such matters as bond issues and so stated to defendants, which fact defendants then and there well knew. That plaintiff was then and there and theretofore and at all times herein mentioned so greatly troubled by the physical collapse of her husband that she was not then possessed of even her normal ability to grasp, understand and appreciate the figures and statements presented to her by defendants, and so explained to defendants, and that defendants conducted all of said negotiations knowing the truthfulness of plaintiff's representations of her harassment and worry as aforesaid." [Tr., pp. 120-121.]

It is admitted in appellant's brief that there is no allegation that she did not read the documents. It is said: "It

was not necessary to say that appellant did not *read* the writings involved." (Ap. Br., p. 12.) Furthermore, the loan agreement [Ex. "A", Tr. 23], the modification thereof [Ex. "C", Tr. 32], the extension agreement [Ex. "E", Tr. 102], and the other documents involved were written in straight-forward plain, easily understood English and they each and all bore appellant's signature.

There is no allegation in the amended complaint that appellant did not know the income of her properties, and no facts are alleged from which it could be inferred that the income was insufficient to meet the mortgage requirements, or that appellant defaulted for any reason other than that she applied the income of her properties to her own purposes instead of using it to meet interest and insurance payments under the bond issue. In this connection it is worthy of note that in the original complaint it was alleged under oath that the income was over $50,000 a year. This allegation is omitted from the amended complaint; but it appears from Exhibit "C" thereto, the loan agreement [Tr., p. 38], that appellant represented in plain and simple English and arithmetic that the net income from her properties, over a period of many months, amounted to $5725 per month, which would make a total of $68,700 per annum. Interest on $360,000 at 7% for one year is $25,200. If the insurance item of $3300, and the further item of $5900 due to her original brokers (which items appellant claims not to have anticipated) be added to the interest item, the total of appellant's obligation would be brought up to $34,400, or $15,600 less than the income figure alleged in the original complaint, or $34,300 less than the income figure based on Exhibit "C."

There is no basis whatever for the claim made in appellant's brief that appellees stood in a confidential relationship toward appellant.

Referring again to appellant's brief, it is said:

> "The instant case is one of confidential relationship wherein appellees not only proposed to secure the writings proper, but assumed the character and status of confidential advisors, 'to the end that they would utilize their wide and varied financial experience and prepare for her a careful and conservative "set-up" upon which in all future negotiations, plaintiff might safely act'." (Ap. Br., p. 8.)

The quotation from the transcript in the above passage is lifted out of its context. The quotation is from paragraph IV of the amended complaint. In that paragraph it is alleged that prior to entering into the loan contract which preceded the issuance of the mortgage bonds, defendants "with the intent and purpose of developing and perfecting a scheme whereby plaintiff would be wrongfully deprived of her property", proposed to plaintiff a plan for the funding of her several obligations, said plan involving the issuance of seven per cent bonds "payable as to both principal and interest in such amounts and at such periods of time, over a term of years, as plaintiff could safely undertake in full view of the actual and probable income of her said Engstrum property as determined by defendants." [Tr. p. 120.] Immediately following the words just quoted is the quotation contained in the passage in appellant's brief which, with the language immediately following it, is as follows:

> "And to that end defendants proposed to plaintiff that they and each of them would utilize their wide and varied financial experience and would prepare

> for her a careful and conservative 'set-up', upon which in all future negotiations plaintiff might safely act, as to the extent of the bond issue necessary to pay all her obligations inclusive of the interest and the amortization payments on said bonds, together with all payments, charges and expenses necessary to the transaction, and at the same time defendants estimated the income which their experience and judgment and their investigation demonstrated she could and should obtain from her said Engstrum property, and represented to plaintiff that such income was reasonable and probable." [Tr. p. 120.]

It appears, therefore, that there is no allegation that appellees *assumed* a confidential relationship toward appellant; and no facts are alleged from which such a relationship could be inferred. Indeed the only inference from the allegations is that appellees were dealing at arm's length with appellant and were undertaking to deceive her.

There is no allegation of fact in the amended complaint relative to the alleged "set-up" from which the contents thereof could be gathered or inferred. It is alleged "that the set-up consisted of a series of figures and pencil memoranda on scratch paper", and "plaintiff at no time had possession of said set-up memoranda and no copy thereof was ever delivered to her, but that said set-up was designedly always retained by defendants." The amended complaint then proceeds:

> "And plaintiff alleges that by reason of the facts last above alleged as to said set-up she is unable to be more definite and certain in regard thereto except that she alleges that the income of the said Engstrum property as computed and stated by defendants in said set-up was greatly in excess of the income theretofore derived therefrom, and that the outlay required by defendants in order that plaintiff might safely

> enter into the said contemplated bond issue, as plaintiff thereafter ascertained, was greatly in excess of the amount represented in said set-up." [Tr. p. 122.]

It will be observed that the set-up, in so far as it related to income, related to matters peculiarly within the knowledge of appellant. It does not appear that the set-up contained a list of appellant's obligations, nor is there any statement that appellees knew the extent of appellant's obligations, and therefore knew how far the proceeds of the bond issue would go. The outlays referred to were matters of mathematical computation and the words "greatly in excess", used both as to income and outlay in the above quotation are without legal significance. All of these matters are left to conjecture. All that is supplied is the unsupported conclusion of the pleador that the set-up represented the income from the property to be in excess of appellant's obligations.

The amended complaint consists of twenty-three printed pages of narrative [Tr. pp. 117-140] and exhibits consisting of eight-three pages. [Tr. pp. 23-106.]

The theory of the amended complaint is that prior to June 29, 1925, defendants "with the intent and purpose of developing and perfecting a scheme whereby plaintiff would be wrongfully deprived of her said property and the whole thereof by defendants without any consideration whatsoever, did begin and thereafter continue a series of steps." [Par. IV, Tr. p. 119.] The various transactions between appellant and appellees are then set forth as eight steps or overt acts done in pursuance of the plan and scheme, as above stated.

Stripped of verbiage, the alleged scheme and overt acts may be stated as follows:

1. That appellees proposed to fund appellant's debts by a bond issue;

2. That appellees furnished a "set-up" showing how this could be done;

3. That the "set-up" misrepresented the "actual and probable income" of appellant's properties and the amount of her outlay;

4. That appellant relied on the misrepresentations of income and outlay and signed a proposal for underwriting the bonds;

5. That after signing the proposal and before she executed the trust indenture, she discovered the fraud when appellees required her to pay a debt of $5900 due other brokers;

6. That when appellees threatened to withdraw unless she agreed to pay the debt she was forced to agree to pay it;

7. That each act of appellees, above stated, and each act of appellees thereafter was done in pursuance of the scheme and design until the bonds were finally foreclosed.

The only misrepresentations undertaken to be alleged are:

First: That the preliminary set-up represented that the actual and probable income of appellant's properties would be sufficient to meet the bond requirements;

Second: That this set-up did not contain all the required outlay.

A review of the transactions, disclosed by the narrative portion of the pleading and exhibits, will show that they are not, nor is any of them tainted with fraud.

Prior to June 29, 1925, appellant was the owner of two parcels of real estate, one consisting of an apartment house in Los Angeles, known as the "Engstrum Property", and the other of a bungalow court in Venice, known as the "Venice Property". [Am. Comp. Tr. 117-119.] On April 22, 1925, appellant entered into a written agreement with the corporate appellee to borrow $295,000 and to evidence the loan by a bond issue on the security of one of the parcels, the Engstrum property. [Exhibit "A", Tr. 23; Am. Comp., Tr. 123-4.] On June 29, 1925, appellant and the corporate appellee abrogated the agreement of April 22nd and entered into a new contract by which the amount of the loan was increased to $360,000 and was to be secured by both the Engstrum and Venice properties. [Exhibit "C", Tr. 32.] As a part of the new transaction, appellant agreed in writing to pay a commission of $5900 due to the brokers who had been instrumental in obtaining for appellant the original loan agreement of April 22, 1925. [Exhibit "B", Tr. 31.] Bonds aggregating $360,000, secured by a deed of trust on the two properties, were executed as of August 1, 1925, pursuant to a permit issued by the Corporation Commissioner of California. [Exhibit "D", Tr. 39.] On September 23, 1925, the transaction was cleared through an escrow at the Citizens Trust & Savings Bank of Los Angeles; that is to say, the bonds were delivered to the corporate appellee, the trust indenture was delivered to the trustee for bondholders; and the proceeds of the loan were rendered to appellant. The proceeds of the bond issue being insufficient to pay off all the prior encumbrances upon the two properties and yield in addition the $5900 which appellant had agreed to pay

the brokers, appellant, concurrently with the closing of the escrow, executed and delivered two promissory notes in the sum of $2950 each, payable in 90 and 120 days, respectively. [Am. Comp., Tr. 129-130.]

The trust indenture, as well as the loan agreement, required appellant to keep the properties insured and to pay all insurance premiums. The first default of appellant was appellant's failure to do so, and on December 23, 1925, the corporate appellee notified appellant that she was in default in the payment of insurance premiums which by the terms of the trust indenture she had agreed to pay. [Am. Comp., Tr. 132.] These premiums were never paid.

The first semi-annual bond interest fell due on February 1, 1926. This interest appellant also failed to pay, and on March 1, 1926, the trustee bank served written notice of default calling attention to this breach and also declaring that on account of appellant's defaults the trustee would proceed as in the trust indenture directed. [Am. Comp., Tr. 133.] The trustee then advertised and posted notices of sale to be held on May 25, 1926. [Am. Comp., Tr. 137.] On the last mentioned date. at appellant's request, the trustee postponed the sale to June 1, 1926, and on June 1, 1926, the trustee again postponed the sale at appellant's request to June 8, 1926. [Am. Comp., Tr. 137]; [Exhibit "E", Tr. 102.]

On June 4, 1926, appellant and the corporate appellee entered into a written agreement whereby appellee agreed to use its best efforts to secure a postponement of the sale again until August 1, 1926. [Exhibit "E", Tr. 102.] In

that agreement appellee acknowledged her defaults in the following language:

> "Since the execution of said trust indenture the income from the property covered thereby has decreased and for various reasons I have been unable to meet the accruing interest and sinking fund and other charges upon said bonds and under said trust indenture." [Tr. 102.] * * * "I realize that the defaults under the above mentioned trust indenture have been long continuing and I recognize the right of the Trustee thereunder to cause the sale of the properties covered thereby to be made on June 8th, 1926, and also your right to require such sale to be made at that time." [Tr. 103.]

In addition to this recitation by appellant of her defaults, appellant, in consideration of appellees' promise, agreed in this instrument (a) to appoint and keep in office as long as she might be in default, as her own agent, and upon her own responsibility, a manager or superintendent satisfactory to the corporate appellee, and (b) to use her best efforts to have deposited with the trustee the moneys in default (other than the accelerated principal of the bonds) and to subject the personal property on the premises to the trust indenture. [Tr. 104-105.] Appellant agreed that if she should fail to pay the moneys in default by August 1, 1926, she would make no objection to the immediate sale of the property by the trustee. The corporate appellee on its part agreed that if appellant should pay said moneys by August 1, 1926, and should subject the personal property to the lien of the trust indenture, it

would then use its best efforts to secure a further postponement of the sale to October 6, 1926. [Tr. 105-106.] The language of the agreement in that behalf is as follows:

> "In the event that I comply with my agreements under subdivision (a) of paragraph 2 above, and duly cause to be accomplished and completed the matters provided for in subdivision (b) of said paragraph 2 you will agree to use your best efforts to bring about another postponement of the above mentioned Trustee's Sale until October 6, 1926." [Tr. 106.]

That this language was used advisedly is shown by appellant's express covenant to make no objection to the sale if she should fail to cure her defaults and also by her statement that she expected to make a supplemental loan which would enable her to pay the moneys in default. In this connection she says:

> "I hope, however, soon to be able to negotiate a supplementary loan secured by all or part of said property and with the proceeds thereof to make all payments at the time due under said trust indenture except payments for the principal amount of bonds which have been declared due pursuant to the terms thereof and to obtain clear title to the furniture and equipment now in or upon the property described in said trust indenture as parcel 1." [Tr. 102-103.]

It is clear that appellant never did comply with her covenants expressed in this agreement which would, if performed, have entitled her to a further postponement of the sale. She alleges, in general terms, in paragraph XII of the amended complaint [Tr. 134], that she did all acts

and things necessary to secure such postponement, but later in the very same paragraph, she says that on *August 12, 1926* (not on or bfeore August 1st) she procured and presented Rudolfo Montes who was ready, able and willing, on August 12, 1926, to pay the moneys in default. She does not allege payment, or even tender of the money, and of course the Mexican gentleman who, she says, was ready and able to pay was not presented on or before August first, the date on which she had covenanted to pay, but he made his first appearance a few minutes before the sale which had been again postponed to August 12th, and when he did appear, the best he could offer was another promise to pay *in futuro*. It clearly appears, therefore, that appellant was in default on August 1st, 1926, under the extension agreement, and that she was still in default on August 12th. Accordingly, on August 12, 1926, the trustee sold the property.

In brief, the appellant pleads a standard proposal for a bond underwriting, a standard form of deed of trust, and the execution and delivery of bonds pursuant to a permit of the Commissioner of Corporations, and then admits her defaults thereunder and the foreclosure of the bonds and the sale of the security. It is clear from the amended complaint that appellees, far from bringing any pressure to bear upon appellant, extended her many indulgences in an effort to help her save her property, and that she lost her property only because she defaulted in her obligations.

POINTS AND AUTHORITIES.

The amended complaint does not state a cause of action because fraud is not alleged.

(a) A mere scheme to defraud is not, itself, actionable.

Brown v. Wohlke, 166 Cal. 121;
Prudential Ins. Co. v. Mohr, 185 Fed. 936;
Pollock on Torts, 2nd Ed. p. 23.

(b) The averments relative to the set-up are mere conclusions of the pleader, and not allegations of fact.

Kranz v. Lewis, 100 N. Y. S. 674;
Church v. Swetland, 243 Fed. 289 (C.C.A. 2nd);
Cella v. Brown, 144 Fed. 742 (C.C.A. 8th).

(c) The allegations relative to the sufficiency of appellant's income to meet bond requirements relate to mere expressions of opinion, which are not actionable.

Sawyer v. Prickett, 19 Wall. 146, 22 L. Ed. 105;
Kimber v. Young, 137 Fed. 744 (C.C.A. 8th);
Mandelbaum v. Goodyear Tire Co., 6 Fed. (2nd) 818 (C. C. A. 8th);
Pigott v. Graham, 93 Pac. 435, 48 Wash. 348, 14 L. R. A. (N. S.) 1176.

(1) Particularly as said opinions related to appellant's ability to do certain things.

Schwitters v. Des Moines Commercial College, 199 Ia. 1058, 203 N.W. 265.

(2) And as said opinions related to matters susceptible to simple mathematical computation.

Henry v. Continental Bldg. & Loan Ass'n., 156 Cal. 667;
Keithley v. Mutual L. Ins. Co., 271 Ill. 584, 111 N.E. 503;

Warren v. Federal L. Ins. Co., 198 Mich. 342, 164 N.W. 449;

Donoho v. Equitable L. Ass. Soc., 22 Tex. Civ. App. 192, 54 S. W. 645.

(d) If said opinions be treated as representations, appellant would not have been entitled to rely upon them, because the facts were equally open to her.

12 Cal. Jur. 756;

Dickie v. Steiger, 4 Cal. App. 622;

Boyd v. Blankman, 29 Cal. 19;

2 Kent. Comm. 484;

Slaughter v. Gerson, 13 Wall. 379, 20 L. Ed. 627;

Beckley v. Archer, 74 Cal. App. 598.

Appellant cannot avail herself of the excuse that she did not understand the documents.

Dale v. Dale, 87 Cal. App. 359;

Uptown v. Tribilcock, 91 U. S. 45, 23 L. Ed. 203;

Chicago Ry. Co. v. Belliwith, 83 Fed. 437 (C.C.A. 8th);

Kimmell v. Skelly, 130 Cal. 555.

The general charges and accusations in the amended complaint are at variance with, and controlled by, the facts therein alleged and by the facts set out in the exhibits attached thereto.

31 Cyc. 337;

Murray v. Murphy, 39 Miss. 214;

Williams v. Hanley, 16 Ind. App. 464, 45 N. E. 622;

Bush v. Madeira's Heirs, 14 B. Mon. 172, 53 Ky. 212;

Tec. Bi & Co. v. Chartered Bank of India, Australia and China, 41 Philippine Reports 596;

State v. Risty, 213 N. W. 952;

Anderson v. Inter-river Drainage Dist., 274 S.W. 448.

If fraud be alleged, it affirmatively appears that it has been waived.

(a) The contract being largely executory at the time of the discovery of the alleged fraud, appellant should have taken action at once instead of choosing to go on with the contract.

Kingman v. Stoddard, 85 Fed. 740;

Simon v. Goodyear Met. Rubber S. Co., 105 Fed. 573;

Bement v. LaDow, 66 Fed. 185.

(b) After the discovery of the alleged fraud, appellant made a new contract with respect to the subject matter.

Lee v. McLelland, 120 Cal. 147;

Ruhl v. Mott, 120 Cal. 668.

(c) After discovering the alleged fraud, instead of dealing with appellees at arm's length, appellant asked and obtained favors and extensions to which she was not legally entitled.

Schmidt v. Mesmer, 116 Cal. 267;

Ball v. Warner, 80 Cal. App. 427;

Holcomb & Hohe Mfg. v. Jones, 228 Pac. 968;

Monahan v. Watson, 61 Cal. App. 417;

Tucker v. Beneke, 180 Cal. 588;

Blydenburgh v. Welsh, 3 Fed. Cas. 771; Case No. 1583;

Schagun v. Scott Mfg. Co., 162 Fed. 209.

(d) The alleged representations in the set-up were merged into, and superseded by, the formal documents.

VanWeel v. Winston, 115 U. S. 228, 29 L. Ed. 384;

Andrus v. Smelting Co., 130 U. S. 643, 32 L. Ed. 1054;

Henry v. Bldg. & Loan Ass'n, 156 Cal. 667.

Appellees did not, nor did either of them, stand in a confidential relationship toward appellant.

(a) "In order to burden the defendants with the duties and responsibilities which ordinarily arise out of such a relation, it was incumbent upon the plaintiff, not only to allege his trust and confidence in the defendants, but to aver, if he could truthfully do so, the existence of facts and circumstances showing, or tending to show, that *they voluntarily assumed toward him a relation of personal confidence.*" (*Bacon v. Soule*, 19 Cal. App. 428, 436.)

(b) "The mere statement in the complaint that the plaintiff had unlimited confidence in and relied upon the defendant is not a sufficient statement of the facts to show a confidential relation. The facts must be alleged, from which the court can see that a confidential relation does in fact exist." (*Robbins v. Law*, 48 Cal. App. 555, 561-2.)

(c) There are no facts alleged from which a confidential relationship can be inferred, and the facts alleged require the contrary inference.

Robins v. Hope, 57 Cal. 493;

Ruhl v. Mott, 120 Cal. 668;

Lewis v. Ziegler, 105 Mo. 604, 16 S. W. 862.

The demurrer was properly sustained without leave to amend.

Demartini v. Marini, 45 Cal. App. 418;

Goebel v. Gregg, 57 Cal. App. 651;

Reios v. Mardis, 18 Cal. App. 276;

Loeffler v. Wright, 13 Cal. App. 224; 232-233;

San Joaquin, etc. Co. v. County of Stanislaus, 155 Cal. 21, 29;

Bell v. Bank of Calif., 153 Cal. 234, 244-5;

Foss v. Peoples etc. Co., 241 Ill. 238; 89 N. E. 351.

BRIEF OF ARGUMENT.

The Amended Complaint Is Made Up of Loose General Charges, Amounting Only to Brutum Fulmen and Does Not Allege Fraud with the Particularity Required by Law, or at All.

The only allegation in the amended complaint which undertakes to charge fraud is found in paragraph V. [Tr. 121.] It is there alleged that the appellee, John E. Sutherlin, prepared and presented to appellant a so-called "set-up" showing on the one hand the actual and probable income of plaintiff's property projected over a term of years, and on the other hand a statement of the costs, charges and expenses as well as payments of principal and interest on the bonds, which "set-up" purported to show appellant that she could safely enter into the transaction and carry and pay all of the obligations she would assume under the set-up; but that in truth and in fact said appellee knew that there would be other charges and expenses, not shown on the set-up, which appellant would be obligated to pay; that as a matter of fact these other expenses exhausted appellant's financial resources and, inferentially, made it impossible for her to make her payments on account of bond interest. As already pointed out, we are not favored with a copy of the alleged set-up nor with a statement of what items were intentionally omitted from the set-up, nor a statement of the amount of such items. The allegation is, therefore, altogether too vague to constitute actionable fraud.

In the case of *Kranz v. Lewis,* 100 N. Y. S. 674, the complaint alleged that the defendant, by means of certain false representations induced the plaintiff to enter into a

contract for the purchase of a house and lot and that such false representations consisted in the defendants stating (1) that the property "was rented for more than in fact it was rented", (2) "that the janitor received less per month for his services than in fact he did", etc. The court upheld an order sustaining the general demurrer to the complaint, saying, in the course of its opinion:

> "It is a common rule of pleading that a bare allegation of fraud is an allegation of a conclusion of law, and therefore not issuable. The facts constituting the fraud have to be specifically alleged. The alleged representation that the property was rented for more than it was rented for in fact does not give the necessary facts. The complaint should state in terms just what the representation was—the amount of rent represented as being received, and the extent of its falsity—so that it could be seen not only whether it was false but whether it was material. A difference of one cent or one dollar, or a larger sum, might be immaterial as a matter of law. The representation that the janitor received less for his services than he was in fact paid is open to the same objection of indefiniteness, and is besides obviously immaterial."

It is, of course, elementary that the acts constituting the fraud charged must be stated with particularity.

In *Church v. Swetland,* 243 Fed. 289 (C.C.A. 2nd), the court said at page 299:

> "In pleading fraud it is a well-established rule that the facts relied upon as constituting the alleged fraud must be set out, and not conclusions. A bill seeking relief on the ground of fraud must state the specific facts and circumstances constituting the fraud, and the facts so stated must be sufficient in themselves to show that the conduct complained of was fraudulent. General charges of fraud, or that acts were fraudulently committed, are without avail, unless accompanied by statements of specific facts amounting to fraud. All through this bill may be found general

charges of fraud. It must be made to appear by the facts alleged, independent of mere conclusions, that if the allegations are true a fraud has been committed. An allegation that a thing is fraudulent is immaterial unless the allegation fits the facts to which it is applied."

In *Cella v. Brown,* 144 Fed. 742, (C.C.A. 8th), the court said:

"The mere charge in a bill in equity that by a fraudulent scheme a reorganization of two railroad companies was fraudulently designed by the promotors is a mere *brutum fulmen.* It states no fact representing issuable matter. The allegation is but a conclusion of law by the pleader, and no relief could be administered thereon. (Citing cases.)"

The Mere Existence of a Scheme to Defraud Is Not Actionable in the Absence of Specific Fraudulent Acts.

In an effort to excuse her failure to allege definite facts constituting fraud, appellant has frequently advanced the contention in the lower court that an allegation of the existence of a mere scheme or plan which can be split up into several steps, stages or divisions states a cause of action in fraud if, as a result of that scheme or plan damage is incurred,—quite irrespective of whether or not actionable fraud in the ordinary legal sense is involved in any of the steps or in the scheme as a whole. This contention is not advanced in appellant's present brief and we therefore suppose it is abandoned. Accordingly, we may dismiss this proposition with a bare citation of cases holding definitely that a mere scheme or plan to defraud is not actionable in the absence of specific fraudulent acts:

Bowman v. Wohlke, 166 Cal. 121;
Prudential Insurance Co. v. Mohr, 185 Fed. 936.

Mere Expressions of Opinion or Representations Promissory in Character or Relating to Future Events Are Not Actionable; This Is Particularly True Where the Opinions Expressed Relate to the Ability of the Person to Whom the Representations Are Made to Accomplish the Desired Results, and It Is Also Especially True Where the Subject Matter of the Representations Is Equally Within the Knowledge of Both Parties.

It is obvious that insofar as the "set-up" related to the previous income of the property and to the obligations which appellant was obliged to refund, the information therein contained must have come from the appellant herself. As already pointed out, appellant, in her application for the loan, set out the previous net income of her properties as $5,725 per month, and there is no allegation in the amended complaint indicating that she was not fully informed as to such matters. Any statement as to the sufficiency of the future income was obviously a mere expression of opinion. It did not require a financial "expert" to add up the items of income on the property, figure the interest on $360,000 for one year at seven per cent and do a simple subtraction. These were matters within the comprehension of anyone and capable of demonstration by the simplest arithmetical methods. The statements alleged to have been made by appellees were therefore matters of opinion and not representations of facts, and appellant was not entitled to rely upon such statements. Moreover, it is clear that appellant's ability to make the income of her properties sufficient to pay a certain amount of interest, sinking fund and other charges would depend very largely upon appellant's own man-

agerial ability, upon her success in keeping her apartments rented, and upon her honesty in applying the income received to meet such charges rather than diverting it to other channels.

In *Henry v. Continental Building and Loan Association,* 156 Cal. 667, 105 Pac. 960, the action was against the building and loan association, and the defendant, by way of cross-complaint, set up a cause of action for the foreclosure of a mortgage. Plaintiff alleged that he had secured the loan from the building association upon the common stock purchase plan whereby the monthly installments eventually mature the stock and pay off the loan. It was alleged that the building association had represented to him that by this plan the loan would be paid off in seven years' time, a representation which turned out to be false. The court held that the representations that the stock earnings would take care of the loan would necessarily be dependent upon the future earnings of the stock, that such a representation would be a matter of opinion only and therefore not actionable.

In the case of *Schwitters v. Des Moines Commercial College*, 199 Ia. 1058; 203 N. W. 265, plaintiff brought suit in fraud and deceit, alleging that the defendant had represented to her that "she could complete a course in shorthand and typewriting and obtain a position in eight weeks time under the expert individual instruction" of the defendant school. The court held that the complaint failed to state a cause of action, saying in the course of its opinion:

> "The representation that appellee could complete the course and obtain a position in eight weeks was

no more than a prophecy. It referred only to the future and its fulfillment in the very nature of things depended upon the ability, previous education, industry and application of the student."

In *Kimber v. Young*, 137 Fed. 744, (C. C. S. 8th), it was held:

"In an action for deceit in a sale of corporate bonds, allegations that defendant knew the bonds to be good, and that they would be paid, principal and interest, at maturity, though stated positively as a fact, were mere matters of opinion, the falsity of which was insufficient to create a liability." (Syllabus, par. 3, p. 744.)

Judge Hook, speaking for the court, said in part:

"Again, the representation must be of existing and ascertainable facts, and *not mere promissory statements based upon general knowledge, information, and judgment.* (Citing cases.) It was said in Union Pacific Ry. Co. v. Barnes, *supra: 'An action for false and fraudulent representations can never be maintained upon a promise or a prophecy.' Nor is mere expression of opinion sufficient, though it be false, and be expressed in strong and positive language.* (Citing cases.) Positive statements as to value are generally mere expressions of opinion and as such cannot support an action of deceit. (Citing cases.)" (Pp. 748-749.)

Mandelbaum v. Goodyear Tire etc. Co., 6 Fed. (2nd), 818, (C. C. A. 8th), was an action by a subscriber to stock for damages consisting of the difference between the subscription price and the market price at the time of delivery. The following is from the syllabus:

"Fraud—12—As applied to future, any representation as to assets maintained is without effect.

"Relative to claim of fraudulent representations in prospectus of company for sale of its stock, any

representation as to amount of assets maintained for benefit of preferred stock, as applied to the future, is of no effect." (Syl. point 6, p. 819.)

The following is from the opinion:

"The balance sheet contained in the prospectus and taken from the books of the company, showed, of course, that it had such assets. As applied to the future, the representation would be without any effect in any event. As to the condition existing at the time the stock was sold, no evidence was produced which would indicate that the company and its officers did not believe that the condition of the company justified the representation made (p. 823)."

See, also:

Keithley v. Mutual Life Insurance Company, 271 Ill. 584, 111 N. E. 503;

Warren v. Federal Life Insurance Company, 198 Mich, 342, 164 N. W. 449;

Donaho v. Equitable Life Assurance Society, 22 Texas Civ. App. 192, 54 S. W. 645.

But assuming that the statements charged to appellees were representations and not mere opinions, still appellant had no right to rely on them. Appellant, in her brief (pp. 9, 10, 16 and 17) has cited cases in support of her contention that she was under no duty whatever to make the slightest investigation of any statement made by appellees, but that she was entitled to rely literally on every syllable they uttered and to found a cause of action on any discrepancies which might be discovered. We think it will be found that in none of the cases cited by appellant were the means of information equally accessible to both parties, and in many of them the misrepresentation involved matters in respect to which the party to whom the representa-

tions were made could not, at least without great trouble or expense, have informed himself, and hence was compelled to rely upon the statements which were made to him. Thus, in the case of *Barron v. Woodruff,* 163 Cal. 561, the representations concerned the intricate matter of building costs in which defendant was an expert and plaintiff knew nothing; in *Herdan v. Hanson,* 182 Cal. 538, *Crandall v. Parks,* 152 Cal. 772, and *Groppengeisser v. Lake,* 103 Cal. 37, the representations concerned land situated at such a distance that plaintiff had no opportunity to inspect it; and all of the cases cited on pages 16 and 17 of appellant's brief contain the same element which distinguishes them from the case at bar—namely that for one reason or another all of the knowledge or means of obtaining information were in the hands of the party making the representation and the other party was therefore justified in relying on the statements that were made to him because it was the only thing he could do. In the case at bar, however, the situation is entirely different, because the alleged misrepresentations related to matters with respect to which appellant was as well or better informed than appellees and which were so simple that no technical or expert knowledge or skill was required. The principles applicable are succintly stated at 12 Cal. Jur. 756, in the following language:

> "In general, parties must rely upon their own judgment and investigate before making contracts. Consequently, where there is no relation of especial trust or confidence and where the means of knowledge are at hand and are equally available to both parties, and the subject matter is alike open to their inspection, if one of them does not avail himself of those means and opportunities when he might readily ascertain the

truth by ordinary care and attention, his failure to do so is the result of his own negligence, and he will not be heard to say that he was deceived by the other's misrepresentations. The law affords to everyone reasonable protection against fraud in dealing, but, as has been well said, it does not go to the romantic length of giving indemnity against the consequences of indolence and folly, or of careless indifference to the ordinary and accessible means of information; nor does the law prevent one from availing himself of his superior knowledge in dealing with another."

In *Dickie v. Steiger*, 4 Cal. App. 622, the court says:

"Courts cannot measure the mental capacity of every person who enters into a business transaction. There is as much difference in the mental capacities of parties to make contracts or enter into business transactions as in their weight, height or features."

In *Boyd v. Blankman*, 29 Cal. 19, the Supreme Court of California went so far as to say:

"It is proper to remark that we do not concede as much force and consequence as do the counsel for the plaintiff to the fact that Mary Hina was an ignorant Kanaka woman, unacquainted with legal proceedings and almost ignorant of our language. We cannot obliterate the recognized rules of law requiring of all persons the diligence and attention demanded of a prudent man in the transaction of his own business, and establish a measure of care and diligence for each particular case."

Appellant contends that the rule stated in the last citation should not be applied because appellees were "experts" and dealing with a person not on an equal footing, and that therefore, their opinions, even as to future events, constitute a basis of misrepresentations. The fact is, however, that appellees were no more expert than appel-

lant was as to the matter of her own income and that their opinion as to what her income would be is the only definite misrepresentation charged. The fact that in cases similar to some of those cited by appellant at pages 16 and 17 of her brief, the courts have sometimes allowed redress where engineers, lawyers, scientists and the like have misrepresented their findings to a layman, has absolutely no application here. In each such instance the facts underlying the representations were facts peculiarly known only to the more experienced party. In the case at bar the most that can be said for the representations made is that appellees represented that the amount of appellant's income (which she herself had been collecting) would pay a certain amount of interest, other charges and principal on a loan made to fund her debts.

Appellant Cannot Avail Herself of the Excuse That She Could Not Understand the Writings Which She Signed.

Appellant seeks in her brief to make it appear that all of the papers in the loan transaction were handed to her for signature and that she helplessly signed them without understanding their import. We have not been able to find any such allegation in the amended complaint, but even if such fact were alleged, it is no excuse. The courts very properly, and with great uniformity, impose upon parties the duty of reading and understanding the documents they sign. If a person cannot read, or being able to read, cannot understand, it is his duty, before signing a document, to avail himself of the services of someone in whom he has confidence to read the document and explain it; if he does not go this far in his own protection, he cannot complain that he did not understand.

Dale v. Dale, 97 Cal. App. 359, a recent California case upon this point, contains the following language:

> "Under the facts of this case the respondent may not complain because he failed to read or understand the terms of the instrument. This duty was imposed upon his attorney whom he employed to draw the documents. A grantor who executes a deed of conveyance, in the absence of a showing of fraud, or mistake, will not be relieved from the effect of the clear terms of the instrument, merely because he neglected to read it, or even if he is unable to read or understand it. Reasonable prudence requires one to either read the document he proposes to execute, or, if he is unable to do so so, to procure the assistance of someone who can read and explain its terms."

In *Upton v. Tribilcock,* 91 U. S. 45, 23 L. Ed. 203, the action was on an unpaid stock subscription. The defense was that the officers of the company had represented that the stock was non-assessable, and that defendant had not read the charter and by-laws. This was held not to be a defense, the court saying:

> "That the defendant did not read the charter and by-laws, if such were the fact, was his own fault. It will not do for a man to enter into a contract and, when called upon to respond to its obligations, to say that he did not read it when he signed it, or did not know what it contained. If this were permitted, contracts would not be worth the paper on which they are written. But such is not the law. A contractor must stand by the words of his contract; and, if he will not read what he signs, he alone is responsible for his omission." (Citing cases.) (25 L. Ed. 205.)

To the same effect are:

Chicago, etc., Ry. Co. v. Bellwith, 83 Fed. 437 (C. C. A. 8th), and

Kimmell v. Skelly, 130 Cal. 555.

The cases cited by appellant in this connection (Ap. Br. pp. 13-14) are all cases in which one party imposed on the other, pretending that the agreement which the other was urged to sign was identical with some other agreement previously executed between them. Thus, in *Mazuran v. Stefanich*, 95 Cal. App. 327, 272 Pac. 772, an attorney falsely stated to his prospective clients who could scarcely understand English that his proposed written contract of employment was identical with the parties' oral agreement and required him to perform seven distinct services for them, whereas in fact it mentioned only one. In *Wenzel v. Schultz*, 78 Cal. 223, it appeared that Wenzel's sight was so impaired that he could not read, and that Schultz, his partner in the business covered by the transaction, induced him to sign a note by representing that it was identical with another note previously signed by Wenzel except that the amount payable had been corrected, whereas, in fact, the new note was made payable one day after date instead of the six months maturity provided by the original note. Again, in *Togni v. Taminelli*, 11 Cal. App. 14, it appeared that the parties were partners in the grocery business, and that as an incident to closing out the affairs of the partnership one of them asked the other to sign a document which he stated was a release, whereas, in fact, a deed of grant was concealed in the instrument. And in *Knight v. Bentel*, 39 Cal. 502, an automobile dealer represented to his customer that the contract she was asked to sign was identical with one which she had previously signed, whereas in fact it was very materially different.

It may very well be that all of these cases were properly decided under their particular facts, but those facts were not in any case analogous to the facts in the case at bar.

The General Charges and Accusations in the Amended Complaint Are at Variance With, and Controlled by, the Facts Therein Alleged, and by the Facts Set Out in the Exhibits Attached Thereto.

It has already been shown that fraud is not alleged in the amended complaint, because (a) a scheme to defraud is not, itself, actionable; (b) the averments relative to the set-up are mere conclusions of the pleader, and not allegations of fact; (c) the allegations relative to the sufficiency of appellant's income to meet bond requirements relate to mere expressions of opinion, which are not actionable; and (d) if said opinions be treated as representations, appellant was not entitled to rely upon them, because the facts were equally open to her.

Assuming that the general charges and accusations in the amended complaint, standing by themselves, are sufficient to charge fraud (which, of course, is not conceded), the amended complaint is still insufficient, because the facts alleged in the narrative part of the amended complaint and set out in the exhibits negative fraud.

As heretofore pointed out, it appears from appellant's pleading that appellees loaned appellant $324,000 in cash; that appellant knew the income of her properties and that it was more than sufficient to meet the bond requirements; that appellant read and understood the provisions of the set-up; that appellant's defaults were due to her failure to apply the income of her properties to the bond requirements and the diversion of said income to her own personal uses; that appellees did not crowd appellant for payment after her defaults, but that repeated extensions were given to her; that the foreclosure sale was fairly con-

ducted, and appellant had full opportunity to bid at the sale, but failed to do so; and that appellant never offered to make good her defaults and has never undertaken to redeem the property.

These facts and circumstances obviously negative fraud, and control the loose charges regarding the alleged scheme to defraud, appellant's condition and the set-up contained in the narrative portion of the pleading.

See, also:

31 Cyc. 337;

Murray v. Murphy, 39 Miss. 214;

Williams v. Hanley, 16 Ind. App. 464; 45 N. E. 622;

In *Bush v. Madeira's Heirs,* 14 B. Mon. 172, 53 Ky. 212, the court said:

> "The demurrer admits for the purpose of testing their sufficiency the facts stated in the petition or bill, but the exhibits referred to must be taken into view as controlling any statement which is inconsistent with them, except so far as the exhibits are themselves directly impeached."

The same principle is clearly and simply stated in *Tec. Bi. & Company v. Chartered Bank of India, Australia and China,* 41 Philippine 596, where the Supreme Court of Philippine Islands says at page 605:

> "A general admission of the truth of the allegations set forth in a pleading is not an admission of the truth of an impossible conclusion of fact drawn from other facts set out in the pleading, nor of a wrong conclusion of law based on the allegation of fact well pleaded, nor of the truth of a general averment of facts contradicted by more specific averments. Thus, if a pleader alleges that two pesos

were borrowed on one day and two more borrowed on another, making five pesos in all, a stipulation of the truth of the allegations in the pleading does not amount to an admission by the opposing party that twice two make five."

In *State v. Risty,* (S. D.), 213 N. W. 952, the gist of the decision is correctly reflected in the headnote, which reads as follows:

> "While, generally, allegation of fraud is an allegation of fact that cannot be disposed of on demurrer, such rule is inapplicable where a complaint, taken as a whole, refutes the allegation of fraud."

In *Anderson v. Inter-river Drainage District No. 1925,* 274 S. W. 448, the decision is also correctly stated in the headnote as follows:

> "On demurrer, petition as a whole is to be looked to and demurrer does not admit as a fact, that which petition contradicts, and a statement made as conclusive or general cannot be held to be unaffected by specific statements which qualify or limit general statement."

Even if There Were Any Fraud, Appellant Waived It by Proceeding With the Transaction After She Discovered the Fraud, by making New Agreements Respecting the Transaction and by Asking and Obtaining Favors and Extensions to Which She Had No Legal Right.

It appears from the amended complaint that long before the execution of the trust indenture and while the entire loan transaction was largely executory, appellant discovered what she alleges to have been the falsity of material representations made by the appellees. In paragraph VII of the amended complaint [Tr. 125] she al-

leges that as early as June 29, 1925, appellees, "contrary to their express promises, statements and representations," required her to pay $5,900 in addition to the items mentioned in the set up. Yet on the same day she executed Exhibit "B", [Tr. 31] increasing the loan and extending it to include the U. S. Island properties, and later executed the trust indenture itself, opened the escrow and went forward with the transaction; still later she asked and obtained the various extensions of time and postponements of the trustee's sale which are set up in Paragraph XIII of the amended complaint. In other words, it is clear that for a long period after the alleged fraud was discovered appellant continued to affirm the contract, to secure modifications and extensions to which she had no legal right, and to conceal any intentions which she may have harbored with reference to an eventual action for deceit. The law applicable to this situation is clearly stated in 12 *Cal. Jur.* at p. 792, Sec. 57, wherein it is stated:

> "Although affirmance of a contract with knowledge of fraud defeats a right of rescission, still an action for damages for the fraud generally exists after such affirmance. But the rule which relieves a party, when he elects to sue for damages, from the acts required of him when he elects to rescind, has the just limitations that, after knowledge of the fraud and election to sue for damages, he must stand toward the other party at arm's length, must comply with the terms of the contract, must not ask favors or offer to perform on conditions which he has no right to exact and must not make any new engagement respecting it; otherwise he waives the alleged fraud."

Schmidt v. Mesmer, 116 Cal. 267. Defendant leased a hotel to plaintiff. In a suit for damages for fraud plain-

tiff alleged that defendant induced the lease by representing that the profits of the hotel had been $750 per month, whereas they had really been only $350. Notwithstanding his knowledge of the alleged fraud, plaintiff continued in possession for a year or more and at the end of that time applied for a reduction of the rent and finally secured an extension of time within which to pay the rent, saying nothing about the fraud. It was held that the conduct of the plaintiff amounted to an affirmance or ratification of the contract and a waiver of the fraud. The court said:

> "It is no doubt the law, that while where a party seeks to rescind a contract into which he was induced to go by the fraudulent representations of another party, he must rescind at once upon the discovery of the fraud, and restore the other party, as near as may be, to his former condition, yet he may elect to go on with the contract, and sue to recover damages for the deceit, without giving any warning to the other party that he intends at some future time to charge him with fraud. This rule, when applied to a continuous contract which runs through a series of years, sometimes, no doubt, works an injustice to the party charged with fraud. It is true that one actually guilty of fraud is not entitled to much consideration; but the real difficulty usually is to determine whether or not the alleged fraud actually existed, and the issue has generally to be determined upon conflicting testimony, and in accordance with the preponderance of evidence. In such a case it is evident that the party who keeps his intended charge of fraud secret for years has a great advantage in preparing for a future intended action, which he alone anticipates, over his adversary, who has had no intimation of such action or such charge of fraud, and has had no reason to preserve or discover evidence concerning it. But this rule, which relieves a party when he chooses to sue for damages from

many of the acts required of him when he elects to rescind, is subject to some just limitations. If, after his knowledge of what he claims to have been the fraud, he elects not to rescind, but to adopt the contract and sue for damages, he must stand toward the other party at arm's length; he must on his part comply with the terms of the contract; he must not ask favors of the other party, or offer to perform the contract on conditions which he has no right to exact, and must not make any new agreement or engagement respecting it; otherwise he waives the alleged fraud." (pp. 270-271.)

To the same effect are:

Schagun v. Scott Mfg. Co., 162 Fed. 209;

Ball v. Warner, 80 Cal. App. 427;

Holcomb & Hoke Mfg. Co. v. Jones (Okla.) 228 Pac. 968;

Monahan v. Watson, 61 Cal. App. 417, 214 Pac. 1002;

Tucker v. Beneke, 180 Cal. 588;

Lee v. McClelland, 120 Cal. 147;

Blydenburgh v. Welsh, (U. S. C. C. A., Pa. 1831), 3 Fed. Case 771, Case No. 1583.

It is also very generally held that where the contract is wholly or largely executory at the time of the discovery of the fraud, the defrauded party must take action immediately and refuse to go further with the contract; otherwise, the fraud is waived, *"Volenti non fit injuria."*

See:

Kingman v. Stoddard, 85 Fed. 740;

Simon v. Goodyear Metallic Rubber Shoe Co., 105 Fed. 573;

Bement v. La Dow, 66 Fed. 185.

Furthermore, the set-up was merely a part of the preliminary negotiations, and was merged in, and superseded by, the formal documents. This plainly appears from the informal character of the set-up, consisting, as it did, "of a series of figures and pencil memoranda on scratch paper" [Tr. 122], and the fact that in the application for the loan agreement appellant expressly represented her income as far in excess of any figure necessary to take care of the bond requirements. [Exhibit "C", Tr. 32.]

In *VanWeel v. Winston*, 115 U. S. 228 (29 L. Ed. 384), the case arose on a bill in equity charging fraudulent representations affecting the character and value of the security on which the bonds in question were negotiated. The following is from the opinion:

> "* * * It (the bill) is full of the words fraudulent and corrupt, and general charges of conspiracy and violation of trust obligations. Mere words, in and of themselves, and even as qualifying adjectives of more specific charges, are not sufficient grounds of equity jurisdiction, unless the transactions to which they refer are such as in their essential nature constitute a fraud or a breach of trust, for which a court of chancery can give relief." (29 L. Ed. 384.)
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> * * * * * * * *
>
> "Whatever representations may have been made in the circulars of the Company was, according to all rules of evidence, superseded by this solemn instrument between the parties. If they differed in any respect, the latter must be looked to as the security on which the bondholders alone had the right to rely. This instrument, so far from giving any pledge or assurance that the branch road should be fifty miles long, or near that, is careful to say it shall not exceed that length. The limitation is in its length, not its

shortness. The latter is provided for by saying that it should be by the most practicable route." (29 L. Ed. 386.)

In *Andrus v. Smelting & Refining Company,* 130 U. S. 643 (32 L. Ed. 1054), the action was at law for fraud and deceit. The following is from the opinion:

> "In the second place, the covenant in the deed for quiet possession merged all previous representations as to the possession, and limited the liability growing out of them. Those representations were to a great extent, if not entirely, mere expressions of confidence in the company's title, and the right of possession which followed it, against all intruders. The covenant was an affirmance of those statements in a form admitting of no misunderstanding. It was the ultimate assurance given, upon which the plaintiff could rely, a guaranty against disturbance by a superior title." (32 L. Ed. 1056.)

In *Henry v. Continental Bldg. etc. Ass'n,* 156 Cal. 667, it was alleged that the respondents were induced to execute the notes and mortgages in suit through misrepresentation. The following is from the opinion:

> "But, conceding that the language of the circulars involved an unqualified declaration of a fact and was reasonably susceptible of the interpretation which the respondents undertake to give it, and that they could well have conceived an understanding of its import which they claim to have received from it, the fact remains that the note and mortgage, constituting the contract to whose terms they bound themselves, contain in detail in clear and unambiguous language the terms, conditions and obligations which they assumed. The plaintiff, Simon Henry, testified that he read the mortgage before signing it, and presumably he understood its terms and conditions and well knew the full scope of the contract to which he made himself a party. It is, I think, well settled that oral or printed

statements made by officers or agents of a building and loan association in contradiction of the plain language of the contract, whether relied upon by the person to whom made or not, cannot be made the basis of an estoppel. (Noah v. American etc. Assoc., 31 Ind. App. 504, (68 N. W. 615); McNamara v. Oakland etc. Assoc., 131 Cal. 337 (63 Pac. 670).)

"There is, as suggested, no obscurity in the language of either the note or mortgage. The latter, among other things, plainly provides that sixty cents per share shall be paid each month and 'until the said shares are fully paid by the said payments and the dividends and accumulations on said shares.' I am unable to comprehend how a person, capable of transacting business for himself, could well misapprehend this language. In fact, the language of both the note and mortgage prescribing the conditions and explaining the methods by which the business between the parties was to be conducted is so clear that even the plaintiffs must have understood that nothing more than an approximation could be made as to the length of time which would probably be required for the stock to mature and the debt to be liquidated." (Pp. 675-676.)

Appellees Did Not Sustain a Confidential Relationship Toward Appellant, as Such a Relationship Is Not Alleged, Nor Are Any Facts Alleged From Which It Could Be Inferred.

It is pointed out in our statement of the case that there is no foundation in the amended complaint for the claim made in appellant's brief that appellees stood in a confidential relationship toward appellant. It is not expressly alleged that appellees, or either of them, *voluntarily* assumed such a relationship, nor are any facts set up which would justify any such inference. Appellant merely alleges that she was so "greatly troubled" by the condition

of her husband that "she was not then possessed of even her normal ability to grasp, understand and appreciate" the figures and statements presented in the negotiations, and "so explained" to appellees. [Tr. p. 120.] It does not appear that appellees had been close friends of appellant, or that she had known them for a long time, or that she placed any particular degree of confidence in them. Appellees were strangers to appellant and obviously on the opposite side of a business transaction.

The mere fact that a party to a business transaction explains to the other party that he is ill does not raise a confidential relationship, nor does the reliance by one party on the other raise such a relationship.

In *Bacon v. Soule,* 19 Cal. App. 428, the court says at page 436:

> "In order to burden the defendants with the duties and responsibilities which ordinarily arise out of such a relation it *was incumbent upon the plaintiff not only to allege his trust and confidence in the defendants, but to aver, if he could truthfully do so, the existence of facts and circumstances showing or tending to show that they voluntarily assumed toward him a relation of personal confidence.*"

In *Robbins v. Law,* 48 Cal. App. 555, plaintiff relied upon a breach of confidential relationship for redress. Briefly, the allegations were that plaintiff reposed trust and confidence in the defendant, and the defendant thereby gained a great influence and control over plaintiff, and in many ways dominated the plaintiff's thoughts, and that the plaintiff had not stood on an equal footing with defendant. At pages 561 and 562, the court said:

> "The direct general allegations of the complaint, paragraph IV, subdivision a, h, and i, faithfully copy

some of the usual descriptive definitions of confidential or fiduciary relations, or relations of trust and confidence. *But the mere statement in the complaint that the plaintiff had unlimited confidence in and relied upon the defendant is not a sufficient statement of the facts to show a confidential relation.* The facts must be alleged, from which the court can see that a confidential relation does in fact exist."

In *Robins v. Hope,* 57 Cal. 493, the plaintiffs sought to avoid a certain deed which they asserted had been procured by the defendant's testator by means of fraud, and that the fraud was more easily perpetrated because of the confidential relations existing between the parties. The defendant's demurrer to the complaint was sustained. The plaintiff electing to stand upon the complaint, judgment was entered for the defendants, from which judgment the appeal was taken. The Supreme Court affirmed the judgment, and with respect to the question of confidential relations had the following to say at pages 496-497:

"It will thus be seen that it is only upon the question of the relations which existed between the parties that the court below and the learned counsel for the appellants differ. The court held that the relation of Hope to the appellants was that of a stranger. The counsel insists, if we do not mistake his position, that conceding that to be so, the deed was procured through the misrepresentations of Hope's agents, between whom and the appellants confidential relations did exist, and the transaction must therefore be viewed in the same light as it would be if such relations had existed between Hope and the appellants, and he, instead of said agents, had made the misrepresentations complained of. Whether under the maxim, *qui facit per alium facit per se,* a principal must be held to adopt the relations which exist be-

tween his agent and those with whom he is transacting business through such agent, may well be doubted. But does it appear that confidential relations did exist between Hope's agents and the appellants? One of those agents was Albert Packard, a practicing lawyer, and he, some three or four weeks prior to the execution of the deed which the appellants seek to avoid, 'visited Z. Branch, the father of F. Branch, then and now being the husband of the said plaintiff, Conception Branch, at their place of residence in the County of San Luis Obispo, and also said Encarnacion (the mother of the plaintiffs), all of whose confidence he possessed to an almost unlimited extent, and over whom he exercised a great influence,' and then and there made the misrepresentations complained of, to the persons above named, who repeated them to the plaintiffs. Now it is alleged that Z. Branch and F. Branch—one the father-in-law and the other the husband of one of the plaintiffs (four of the five plaintiffs are married women), and the mother of the plaintiffs, had almost unlimited confidence in said Packard, and that he exercised great influence over them. Does that show that a confidential relation existed between Packard and the appellants, or even between him and the three persons to whom he directly made the alleged misrepresentations?

The phrases "confidential relation' and 'fiduciary relation' seem to be used by the courts and law writers as convertible terms. It is a peculiar relation which undoubtedly exists between 'client and attorney, principal and agent, principal and surety, landlord and tenant, parent and child, guardian and ward, ancestor and heir, husband and wife, trustee and *cestui que* trust, executors or administrators and creditors, legatees or distributees, appointer and appointee under powers, and partners and part owners. In these and the like cases the law, in order to prevent undue advantage from the unlimited confidence, affection, or sense of duty which the relation naturally creates, requires the utmost degree of good faith

(uberrima fides) in all transactions between the parties.' (1 Story's Eq. Jur. 218.) If there is an allegation of the existence of any peculiar relation between Packard and the appellants, or between him and the persons to whom he is alleged to have made misrepresentations respecting the title of the appellants to the land which they conveyed to Hope, it has escaped our observation. There is nothing peculiar in the alleged relation between Packard and the persons to whom he is alleged to have made misrepresentations, and it is not alleged what relation if any existed between him and the appellants. *It is alleged generally that the persons to whom he made the misrepresentations had almost unlimited confidence in him, and that he had great influence over them, but why that was, or would naturally be so, is not apparent. Certainly no relation is shown to have existed between him and them from which the law would infer such confidence and influence."*

In the case of *Ruhl v. Mott,* 120 Cal. 668; the defendant appealed from the judgment and from an order denying his motion for new trial. The Supreme Court reversed the judgment and order. The plaintiffs sought to enforce a rescission of an executed contract for the purchase and sale of agricultural lands, in which he was the vendee. His relief was based in part upon a breach and abuse of confidential relations existing between the parties, and also upon weakness of mind of the plaintiff induced by sickness and intoxication, of which defendant took advantage. In brief, the complaint stated that the plaintiff was a bookbinder by occupation and obtained a considerable portion of his business from the printing and stationery house of H. S. Crocker & Company, of which defendant was a member; that the plaintiff went to the defendant expressing his desire to purchase a piece of land suitable for horticultural purposes, and that the

defendant induced him to purchase defendant's ranch by means of artifice and fraud.

The averment of the plaintiff with relation to confidential relationship was merely that plaintiff was sick and unable to resist defendant's importunities. The finding of the trial court in this respect was that plaintiff, though physically sick, continued to transact business. At pages 678-679, the court said:

> "Nor can his ignorance be palliated or excused because of the alleged confidential relations which existed between plaintiff and defendant, or because of plaintiff's alleged weakness of mind.
>
> "The court does not find that he was of weak mind, and plaintiff's own testimony as to other land transactions, and the uniform financial success with which he met in his speculations, negatives the idea that he was of feeble intellect. The confidential relationship is found by the court in the following language: 'One-half or more of all the business done by plaintiff came from the defendant, as manager of the firm of H. S. Crocker & Co., and, as a result of the relation between them, plaintiff reposed great confidence in defendant, trusted him, and relied upon him for advice.' But this finding is not sufficient to establish the confidential relationship defined in section 2219 of the Civil Code, so as to charge the defendant with the high duties pertaining to a trustee, and to shift the burden of proof to show the unfairness of the transaction from the plaintiff, where it naturally rests, to the shoulders of the defendant, and compel the latter to establish the fairness of the sale. It is to be remembered that plaintiff was himself a business man, had bought and sold real estate, and was contracting with the Crocker Company, of which defendant was a manager. *The fact that he reposed confidence in the defendant did not cast any duty upon the latter, unless he 'voluntarily assumed a relation of personal confidence' with*

plaintiff, and this is not found. Equity always views with strictness the business dealings of a man with one who stands in a position of dependence or confidence to him, when that relationship is either voluntarily assumed or is imposed by operation of law. But it would indeed be an anomaly if one dealing with a vendor of land should be allowed to shut his eyes and ears and making no use of his faculties in determining the value of the property he purchased, thereafter excuse himself by saying that he reposed confidence in the vendor. He may in fact have done so, but the fact does not establish a confidential relation as known to law, and for his trusting folly neither law nor equity can afford him redress."

The case of *Lewis v. Zeigler*, 105 Mo. 604, 16 S. W. 862, was one wherein it was sought to declare defendant trustee for plaintiff in purchasing the property then in question. Among other things, it was charged that the defendant breached the confidence reposed in him by plaintiff. The judgment for defendant was affirmed, the court saying at pages 607-608:

"The charge in the petition upon which plaintiff bases her right to relief is that she was uneducated and ignorant; that before she moved to St. Louis she lived near defendant, frequently worked for the family, went to him for advice, and reposed great confidence in him; that about the time the partition suit was commenced she placed the property in his charge for renting, paying taxes, and looking after generally, and that he agreed in case the property did not sell at partition sale for more than $200 to buy it in for her.

"We think there can be no doubt from the evidence that plaintiff, who was a colored woman, was ignorant, uneducated and confiding, and when she lived in Ste. Genevieve was frequently employed in plaintiff's family as a domestic, and that she had great confidence in the integrity and ability of de-

fendant and his willingness to advise and assist her. The property sold for only about one-half its actual value.

"There can be no doubt that if confidential relations had been shown to exist between these parties in reference to the management and sale of his property, or if they had dealt directly with each other, the inequality in their business capacity and the relations between them would call for the closest scrutiny, and, if any unfairness or breach of confidence was manifest, a court of equity would interfere to require that to be done which in equity should have been done. We do not think the rule would go to the extent of creating a trust in the purchaser from the mere facts of the inequality, and that confidential relations between the parties had existed generally seven or eight years previous to the transaction and had no connection with the particular matter about which complaint was made.

"A careful examination of the evidence fails to satisfy us that defendant occupied such a relation of confidence to plaintiff as would as would preclude him from bidding in his own interest at the public sale of this land."

The cases cited by appellant (Appellant's Br., pp. 6-7) are not in point.

In *Cox v. Schnerr,* 172 Cal. 371, an action to cancel a deed on the ground of fraud and undue influence, it appeared that the grantee had for many years been the close friend and confidential advisor of decedent, had handled her properties for her and had been intrusted with legal titles to her properties. In view of the great confidence reposed in the grantee and of his long continued relationship with the grantor, the burden was very properly placed upon the grantee to show the *bona fides* of the transaction. In *Ross v. Conway,* 92 Cal. 632, which was like-

wise an action to cancel deeds obtained by undue influence, it appeared that the grantee was a pastor and that the grantor was one of his parishioners; that he had been her spiritual advisor for many years and that she was a woman of weak mind and about to die. Here, again, the burden was very properly placed upon the grantee of showing the good faith of the transaction. In *Odell v. Moss,* 130 Cal. 352, a similar action, it appeared that the defendant had obtained a deed from her brother, who given to over-indulgence in intoxicating liquor, who was weak-minded and who, shortly after the execution of the deed, was adjudged incompetent. It appeared that for many years the brother had reposed unusual confidence in his sister, that she had looked after his properties for him and that on various occasions she had declared that she held the property in trust for him.

Leave to Amend a Complaint Is Properly Refused Where, as in the Case at Bar, It Is Apparent That Plaintiff Cannot State a Cause of Action, Especially Where Repeated Attempts to State a Cause of Action Have Resulted in Failure.

This proposition of law is too well settled to require any extended discussion. We merely cite the following cases as illustrating the principle:

Demartini v. Marini, 45 Cal. App. 418;
Goebel v. Gregg, 57 Cal. App. 651;
Reios v. Mardis, 18 Cal. App. 276;
Loeffler v. Wright, 13 Cal. App. 224;
San Joaquin etc., v. County of Stanislaus, 155 Cal. 21;
Bell v. Bank, 153 Cal. 234;
Foss v. Peoples Co., 241 Ill. 238; 89 N. E. 351.

In this connection, we again call the court's attention to the stipulation set out on page 162 *et seq.* of the transcript, from which it appears that the amended complaint in this case is the second effort in the fifth suit, in the same court, to distort a transaction which appellant's own exhibits show to be bona fide.

Respectfully submitted,

Joseph L. Lewinson
L. R. Martineau, Jr.
Warren Stratton
Attorneys for Appellees.